STATE OF MICHIGAN
SUPREME COURT

ANILA MUCI,

Plaintiff-Appellee,

vs.

STATE FARM MUTUAL
AUTOMOBILE INSURANCE COMPANY,
a foreign corporation

Defendant-Appellant.

Supreme Court No. 129388
Court of Appeals No. 251438

Wayne County Circuit Court
No. 03-304534-NF

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PLAINTIFF-APPELLEE'S SUPPLEMENTAL BRIEF PURSUANT TO THE COURT'S ORDER DATED JUNE 2, 2006

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I. WHETHER THERE IS A CONFLICT BETWEEN MCL 500.3151 AND MCR 2.311?

Plaintiff-Appellee says , "No."

II. WHETHER, IF THERE IS A CONFLICT, THE COURT RULE IS CONTROLLING?

Plaintiff-Appellee says , "Yes."

III WHETHER A TRIAL COURT MAY IMPOSE REASONABLE CONDITIONS AS PART OF THE EXAMINATION PROCESS?

Plaintiff-Appellee says , "Yes."

IV. WHETHER A PLAINTIFF MUST ESTABLISH MISCONDUCT SPECIFICALLY DIRECTED AT THE PLAINTIFF BY THE EXAMINER BEFORE REASONABLE CONDITIONS ARE IMPOSED?

Plaintiff-Appellee says , "No."

V. WHETHER THE CONDITIONS IMPOSED IN THIS CASE WERE REASONABLE?

Plaintiff-Appellee says , "Yes"

ARGUMENT

(I) MCL 500.3151 AND MCR 2.311 DO NOT CONFLICT.

In *McDougall v. Schanz*, 461 Mich. 15, 26 (1999), this Court stated that the first step in an analysis regarding whether a court rule or a statute controls is first to determine whether there is a conflict between the court rule and the statute. "When there is no inherent conflict, 'we are not required to decide whether [the] statute is a legislative attempt to supplant the Court's authority.'" *McDougall* at 24, quoting *People v. Mateo*, 453 Mich. 203, 211 (1996).

It has been suggested that rules of procedure and practice adopted by the Court provide "how" an action is to be brought, whereas the Legislature specifies "what" actions may be brought. *Clemons v Detroit Dep't of Transportation*, 120 Mich. App. 363, 372; 327 N.W.2d 480 (1982). *citing Brown v Porter*, 13 Mich App 6, 9-10; 163 NW2d 709 (1968).

In the context of a no-fault action, the Legislature, by conferring an insurer with the substantive right to an IME, is not attempting to affect court practice or procedure--it is merely stating that "what" an insurer is entitled to discover regarding a claimant's condition. "How" that IME is conducted (where, when, under what conditions and the scope of the exam) is clearly procedural. Thus, there is no conflict because MCR 2.311 is the procedural implementation (the "how") of the Defendant's right to an IME (the "what") under MCL 500.3151.

The Defendant's argument that the rule and statute conflict because, while the statute gives the insurer a right to have the examination taken, the court rule "requires

the insurer to show good cause" before the examination will be permitted, is without merit. (Defendant's App. For Leave, p.11) In this regard, the "good cause" requirement in MCR 2.311, and the first sentence of §3151, which expressly limits an insurer's right to an examination "[w]hen the mental or physical condition of a person is material to a claim . . ." MCL 500.3151 [emphasis added] are practically identical in meaning and effect. .[1]

Defendant also argues that the court rule and statute conflict because "the statute explicitly authorizes the insurer to set reasonable conditions for the examination. The Court Rule wrests that right from the insurer and requires the court (rather than the insurer) to do so." (Defendant's App. For Leave, pp.11-12)

First, the statute gives the insurer a right to "include reasonable provisions in a personal protection insurance policy" for the examination. MCL 500.3151 (emphasis added) The court rule does not wrest away any rights from the insurer, because §3151 does not give the insurer the "right to contract to determine how to proceed with discovery in a civil action." *Muci v. State Farm Mut. Auto Ins. Co.,* 267 Mich App 431, 441; 705 NW2d 151.

The Court Rule does nothing to nullify an insurer's right to the exam. Under the Court of Appeals' decision, the insurer will always be permitted to have an exam when a person's condition is material to a claim. Moreover, an insurer will always be permitted to include reasonable provisions in its policy regarding the claim, including choosing the physicians. However, the rights provided by the statute are not so absolute so as to bar the trial court from invoking applicable court rules in matters of discovery in a civil

[1] The term material means, "being both relevant and consequential; crucial: *testimony material to the inquiry. See* Synonyms at relevant." *The American Heritage Dictionary of the English Language*, (4th Ed)

action to: determine what issues are relevant, safeguard the attorney-client privilege, prevent discovery abuses, etc. *Cf. McDougall v. Schanz*, 461 Mich 15, 30, n15 (1999). The Defendant has also challenged the court's reliance on MCL 500.3159. The Court of Appeals held that "the Legislature has expressed a plain intent in MCL 500.3159 to give the trial court authority to issue a discovery order. MCR 2.311 is consistent with MCL 500.3159." *Muci* at 441. Defendant claims that as MCL 500.3153 is the enforcement mechanism for §3151, §3159 only pertains to enforcing MCL 500.3158. Defendant's argument fails for several reasons. First, unlike §3153 (which specifically identifies § 3151 and § 3152), §3159 is void of any reference to §3158. To the contrary, §3159 combines the language found in MCR 2.311 and the Court Rule pertaining to protective orders, MCR 2.302(C), both of which are intended to protect against discovery abuses. MCR 2.302 (C) states in pertinent part:

"(C) Protective Orders. On motion by a party or by the person from whom discovery is sought, and on reasonable notice and for good cause shown, the court in which the action is pending may issue any order that justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following orders:

(1) that the discovery not be had;
(2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place;
(3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;
(4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters.
(5) that discovery be conducted with no one present except persons designated by the court; . . ." MCR 2.302 [emphasis added]

There is nothing in § 3159 which limits its application to discovery disputes between a no-fault insurer and an employer or health provider. If the Legislature had intended

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(Houghton Mifflin Co 2000).

§3159 to only apply to §3158 it would have specifically referenced §3158 in the statute as it did in §3153 with respect to §§ 3151 and 3152. Accordingly, the Court of Appeals was correct when it held that "the trial court correctly treated the motion as a discovery device subject to MCR 2.311." (Exhibit 8 at p. 6)

Based on the foregoing, there is no conflict because MCR 2.311 is the procedural implementation (the "how") of the Defendant's right to an IME (the "what") under MCL 500.3151.

(II) TO THE EXTENT THE COURT RULE AND STATUTE CONFLICT, THE ISSUE IS PROCEDURAL IN NATURE AND THEREFORE THE COURT RULE PREVAILS.

In *McDougall, supra*, this Court stated that under the Michigan Constitution, "[i]t is beyond question that the authority to determine rules of practice and procedure rests exclusively with [Michigan Supreme Court]." The line between substantive law and practice and procedure must be drawn case by case. *McDougall*, supra at 36.

MCR 2.311 is contained within the Michigan Rules of Civil Procedure under the subchapter MCR 2.300 which is entitled "DISCOVERY." Rules regarding discovery are clearly procedural in nature. *People v. Phillips,* 468 Mich. 583, 663 NW2d 463 (2003). Moreover, the U.S. Supreme Court has held that the federal equivalent of MCR 2.311 Fed R Civ P 35, is procedural as opposed to substantive in nature. *Sibbach v. Wilson & Co.*, 312 U.S. 1, 14; 61 S. Ct. 422; 85 L. Ed. 479 (1941).

Thus, Assuming arguendo that that MCR 2.311 and MCL 500.3151 conflict, the court rule prevails. To hold otherwise would place the total control of an element of discovery in a civil action with the insurer, thus stripping a trial court of its power to effectuate the fair and orderly dispatch of litigation. Such logic is nonsensical and does

not reflect the purpose of MCL 500.3151. The request by a Defendant for a medical examination is certainly a form of discovery, the Michigan Court Rules, and not the Defendant's insurance policy, controls the rules of discovery.

(III) A TRIAL COURT MAY IMPOSE REASONABLE CONDITIONS AS PART OF THE EXAMINATION PROCESS.

The seminal federal case interpreting Rule 35, F.R.Civ.P., recognized that a compelled medical exam is the most intrusive and, therefore, the most limited discovery tool. *Schlagenhauf v. Holder* 379 U.S. 104, 85 S. Ct. 234, 13 L. Ed. 2d 152 (1964). Thus, the trial court should be given broad discretion to impose reasonable conditions on such exams.

As discussed by the Court of Appeals, the right to include reasonable provisions for medical examinations in a no-fault policy is not intended to give the parties a right to determine *how* to proceed with discovery in a civil action. *Muci*, at 441. In fact the legislature has expressed a plain intent in § 3159 to give the trial court authority to issue a discovery order. *Id.* "MCR 2.311 is consistent with MCL 500.3159." *Id.*

The express language of MCR 2.311 confirms that the court must set forth the conditions of an examination: "...the order must specify the time, place, manner, ***conditions***, and scope of the examination...." (emphasis added) Moreover, § 3159 states that a court can issue an order that:

> "(2) that the discovery may be had only on specified terms and ***conditions***, including a designation of the time or place;
> (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;
> (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters.

(5) that discovery be conducted with no one present except persons designated by the court; . . ." MCL 500.3159(C) (emphasis added)

Clearly the trial court has the power to control elements of discovery. The no-fault act agrees with that view and the express terms of MCR 2.311 requires that conditions be included in an IME order.

(IV) A PLAINTIFF DOES NOT NEED TO ESTABLISH MISCONDUCT SPECIFICALLY DIRECTED AT THE PLAINTIFF BY THE EXAMINER BEFORE REASONABLE CONDITIONS ARE IMPOSED.

There is nothing in MCR 2.311, MCL 500.3151, or MCL 500.3159 that would require that a Plaintiff establish misconduct *specifically directed at the Plaintiff by the examiner* before reasonable conditions are imposed. The Defendant has never even alleged that such a requirement would be required.

Such a requirement would completely undermine a trial court's oversight of these types of examinations. In this regard, with rare exceptions, a claimant is only seen by an insurer's medical examiner on one occasion. The claimant could not possibly be able to present evidence of misconduct directed at the particular claimant by the examiner who is the subject of the order before the examination even takes place. Moreover, once the exam proceeds without an order in place, and the misconduct occurs (thus providing the claimant with the requisite evidence to satisfy this burden), the damage of the misconduct would have already transpired and the need for the protection of the order passed. In essence, such a requirement would be akin to closing the barn door *after* the horse had already escaped.

(V) THE CONDITIONS IMPOSED IN THIS CASE WERE REASONABLE.

Of the 19 paragraphs in the trial court's Order, the Defendant only challenged ¶¶ 2-3, and ¶¶ 12-16 on Appeal. Defendant failed to fully brief or argue any objection to ¶ 3.

Paragraph 2 actually consisted of two conditions: (1) whether Plaintiff's attorney can be present at the examination and (2) whether to allow videotaping of the examinations. The Court of Appeals held that Defendant waived any challenge to paragraph 2 because its attorney agreed to these conditions if the court rule applied. Nonetheless, the conditions in paragraph 2 are reasonable.

MCR 2.311 clearly states that the court may order that the Plaintiff's attorney be present at the examination. Moreover, there is no "good cause" requirement in MCR 2.311 that Plaintiff must meet before the court can require this, or other conditions, in the order.

Nonetheless, the Plaintiff demonstrated why the conditions in the order are needed. Furthermore, the Court of Appeals alluded to as much when it acknowledged Plaintiff's concerns that the Defendant's examiner would conduct a *de facto* deposition. *Muci* at 444.

In addition, Defendant's entire factual argument relied on Affidavits from two examiners, Dr. Mercier and Dr. Gola neither of whom are even listed on Defendant's witness list. Dr. Mercier's past conduct and track record in previous defense medical exams warranted the Court's intervention. For example, in a previous medical malpractice case, Dr. Mercier tried to delve into matters which are protected by attorney client privilege, in particular, the plaintiff's private communications with her counsel

regarding settlement negotiations. (See Exhibit 14 attached to Plaintiff's Resp. to Defendant's App. For Leave). Accordingly, there is more than good cause for Plaintiff to have her attorney with her at the examinations in order to prevent Dr. Mercier and Dr. Gola from asking improper questions and to ensure that Plaintiff is not intimidated and induced to reveal matters that are protected by attorney client privilege.

Second, the condition allowing the presence of Plaintiff's attorney was reasonable because Defendant's own experts did not object (See Exhibits 16 and 17 of Plaintiff's Resp. to Defendant's App. For Leave)

Plaintiff has also raised valid concerns that the examination might be conducted in an unfair manner. Dr. Mercier has already demonstrated his propensity for unethical and unfair conduct. Curiously, Dr. Gola is not even on Defendant's witness list, and was not one of the original examiners initially proposed by Defendant. In fact, Plaintiff did not even become aware of Defendant's request to have Plaintiff examined by Dr. Gola until Plaintiff received Defendant's motion for rehearing. The fact that Defendant has "switched" the examiners after the initial order was entered raises serious concerns as to both Dr. Mercier and Dr. Gola's objectivity.

The condition in paragraph 2 allowing the taping of the examination by audio and visual purposes is reasonable as well. As discussed in *Metropolitan Property & Casualty Ins Co v. Overstreet*, 103 SW3d 31 (Ky 2003), video recording provides little if any disturbance, and it helps eliminate the battle of words at trial because it creates an exact record of the exam. If the examiner remembers the details of the examination differently from the examinee, the videotape will be available to put the matter to rest. *Id.* Furthermore, Defendant's experts concede in their Affidavits that the presence of

Plaintiff's attorney and/or recording devices during the clinical examination has no affect on their ability to conduct a proper examination. There is considerable justification for allowing Plaintiff to have her attorney present at the exam to make sure that the defense examiners do not engage in conduct that would violate the conditions of the order.

Paragraph 12 is reasonable because it simply allows the Plaintiff's attorney to prevent the medical examiner from violating the terms of the order. i.e. instructing the Plaintiff not to answer a question that is clearly protected by attorney client privilege. As in a deposition, the Plaintiff's attorney would not be able to prevent a claimant from answering a question (unless it involved privilege See MCR 2.306(C)(4)) or violated the terms of the order.

Paragraph 13 of the order, requires the Defendant to provide all pertinent information regarding the Plaintiff to the medical examiner. Similarly, this is reasonable and necessary for several reasons. First, it ensures that the Defendant's expert consider Plaintiff's entire medical history instead of what he chooses to arbitrarily elicit from the Plaintiff during the clinical examination before forming his opinions. As Plaintiff's no-fault insurer, Defendant has complete access to all of Plaintiff's medical records, pre and post accident. Second, it prevents the examiner from accusing the Plaintiff of trying to hide significant elements in her medical history.

The remaining conditions at issue inherently dealt with issues of relevancy. The Court of Appeals recognized that the trial court may limit discovery to relevant issues. *Muci* at 443 citing *Bloomfield Charter Twp v Oakland Co Clerk*, 253 Mich App 1, 35; 654 NW2d 610 (2002)). Plaintiff does not have to show particular instances of bias or

misrepresentations of the examiners in order to argue that a defense medical exam should be limited to relevant issues. Thus, the Plaintiff has a legal basis for requesting the subject conditions.

The Court of Appeals recognized that paragraph 14 simply prevents the medical examiner from inquiring into unrelated issues, such as those that pertain to negligence. It in no way prevents the examiner from obtaining an oral history of how the injury occurred (such as whether she hit her head), medical history, or other matters related to her injuries and condition.

Moreover, paragraph 15 simply comports with the doctrines and themes throughout the court rules (and the no-fault statute itself) regarding the scope of discovery as to relevant issues and the in controversy requirement.

However, Defendant maintains that the order prevents the medical examiner from determining what is medically relevant and places that determination in the hands of the Plaintiff's attorney. To the contrary, Paragraph 12 of the order simply allows Plaintiff's attorney to prevent the medical examiner from violating the terms of the order. i.e. instructing the Plaintiff not to answer a question that is clearly protected by attorney client privilege.[2]

Paragraph 15 is supported by the "in controversy" requirement of MCR 2.314, which serves to limit discovery normally permitted by MCR 2.302(B). Paragraph 15 prevents the examiner from "muddying the waters" by focusing on medical conditions that the Plaintiff has not placed in controversy. Moreover, nothing in the order places the

[2] This is obviously necessary given Dr. Mercier's past conduct of asking a claimant what their attorney thinks about how the case is going.

discretion on what is "in controversy" with Plaintiff's attorney; such matters should be left to the trial court's discretion.

Finally, paragraph 16, provides a fair and efficient mechanism wherein the defense examiner is able to obtain any information (not obtained during the clinical or testing examination), that he deems necessary to formulate his opinions, while ensuring that the information is accurate and consistent with the facts. To allow the examiner to ask any question to the Plaintiff without counsel is equivalent to allowing Defendant's agent to have ex-parte contact with a party and essentially amounts to a second deposition of Plaintiff.

The most appropriate method is to require the Defendant to provide all pertinent information regarding the Plaintiff to its own medical examiners and this is necessary for several reasons. First, it ensures that the Defendant's experts consider Plaintiff's entire medical history before forming their opinions, instead of what they choose to arbitrarily elicit from the Plaintiff during the interview. Moreover, Defendant has complete access to all of the Plaintiff's medical records.

Second, it prevents the examiner from accusing the Plaintiff from trying to hide significant elements in the Plaintiff's medical history. In this regard, if Defendant's medical examiners are permitted to interview the Plaintiff, without a record, the medical examiners would be free to "select" what portions of the interview they relied upon and there would be no feasible means to cross examine them on the information that they really elicited from Plaintiff. To use the old cliché it would result in a "he said she said" scenario.

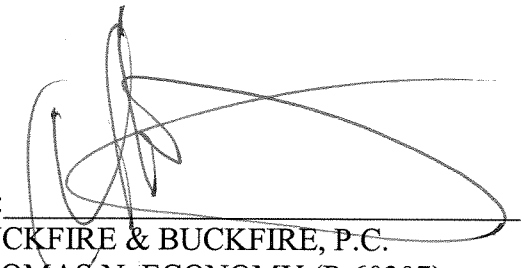
Based on the foregoing, it is clear that paragraphs 2, 12-16 of the instant order are warranted and do not adversely affect the accuracy and credibility of the medical examiners results.

CONCLUSION

This Court should deny Defendant's Application For Leave to Appeal for the reasons outlined above.

First, there is no conflict between the court rule and the statute. The court rule implements how the exam will be conducted. Second, if here is a conflict the court rule clearly prevails because the § 3151 cannot determine discovery can proceed in a civil action. Third, there is no question that the trial court can impose reasonable conditions on these exams. Fourth, there is no requirement that a Plaintiff show misconduct direct specifically against him or her by the examiner before conditions would be imposed. Finally, the conditions in this order are clearly reasonable.

Defendant's Application For Leave should be denied.



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Dated: July 26, 2006

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PROOF OF SERVICE

STATE OF MICHIGAN)

COUNTY OF OAKLAND)

THOMAS N. ECONOMY, being first duly sworn, deposes and says that on July 26, 2006, he did serve a copy of **PLAINTIFF-APPELLEE'S SUPPLEMENTAL BRIEF PURSUANT TO THE COURT'S ORDER DATED JUNE 2, 2006** upon:

JAMES G. GROSS, 615 Griswold, Suite 1305, Detroit, Michigan 28226; and **JAMES F. HEWSON, ESQ., 29900 Lorraine, Suite 100, Warren, Michigan 48093** by mailing same to said attorney's offices in a sealed envelope, properly addressed, with first class postage pre paid thereon, and by depositing same in the Untied States Mail.

I declare that the foregoing statement is true to the best of my knowledge, information, and belief.

Thomas N. Economy

Dated: July 26, 2006